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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

CHARLES W. BARTLETT, TRUSTEE, ET. AL.,
Respondents.

BRIEF OF RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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October 11, 1967

PRESS OF GEORGE H. DEAN CO., BOSTON

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OPINIONS BELOW

The opinions of the Court of Appeals for the First Circuit which are involved in the petition for certiorari are the "Memorandum and Order" dated March 29, 1967, dismissing appellant's appeal, and the "Memorandum and Order" dated April 18, 1967, denying appellant's petition for rehearing. They are unreported, and are annexed hereto as Appendices A and B and made a part hereof.

The Report of the Interstate Commerce Commission approving the Boston and Providence Railroad Corporation (B&P) reorganization plan is dated March 11, 1966, and is found at 327 I.C.C. 10. The opinion of the District Court for the District of Massachusetts approving the plan is dated November 8, 1966, and is reported at 260 F. Supp. 415.

QUESTION PRESENTED

In dismissing petitioner's appeal "for want of diligent prosecution," did the United States Court of Appeals for the First Circuit so far depart "from the accepted and usual course of judicial proceedings" as to require an exercise of this Court's jurisdiction under Rule 19.1.(b)?

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

Despite two extensions of time for the filing of a petition for certiorari, the petition for certiorari as filed states no reasons for granting the writ.

Instead, the petition for certiorari seeks to incorporate the materials contained in the petition for mandamus previously filed by petitioner (No. 661, Misc.), including a lengthy brief on the merits to the Court of Appeals for the First Circuit, which was never properly filed in that Court. This attempt disregards this Court's Rule 23 and particularly paragraph 3 thereof.

If, despite petitioner's disregard of this Court's rules, this Court should deem it appropriate to consider the petitioner's materials contained in the mandamus proceeding in determining this petition for certiorari, then respondents respectfully ask this Court to consider their opposing brief in the mandamus proceeding.

CONCLUSION

For the foregoing reasons, the Trustees of the property of The New York, New Haven and Hartford Railroad Company, urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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October 11, 1967

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding by depositing in the United States Post Office at Boston, Massachusetts, with first-class postage prepaid, a copy thereof properly addressed to counsel of record for each of the said parties at his post office address.

Dated at Boston, Massachusetts, this 11th day of October, 1967.

JAMES GARFIELD
30 State Street
Boston, Massachusetts 02109

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
APPELLANT,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
APPELLEES.

[IN THE MATTER OF BOSTON AND PROVIDENCE RAILROAD CORPORATION OF BOSTON.]

MEMORANDUM AND ORDER

March 29, 1967

Per Curiam. The court has considered appellant's motion for reconsideration, appellees' second motion to dismiss, and appellant's memorandum in opposition thereto. In the last mentioned, appellant's counsel states that he was "led to believe" certain things. Careful inquiry of our clerk's office discloses that he was not led to believe any of the stated matters by that office. He was not led to believe them by the court. We cannot understand how, when appellant by order of court was denied a motion for extension for a month, he should have assumed that a motion to extend for a week would be granted simply by asking for it, let alone that he could ask for it the last day, too late for him to do anything if we denied it. Nor do we understand how he could think, having filed a designation of what he proposed to print, that he could, on said last day, expect that he could be allowed not to print various designated matters, or even furnish copies to the court or counsel.

Finally, we do not understand how counsel thought, by asking this further extension, and shortening appellees' time, that he was not, as he puts it, "cramping appellees," particularly having in mind counsel's own characterization that "This is no ordinary appeal." We also note that the printer has informed us this morning that the record cannot be printed even on the date to which extension is now asked. Had counsel diligently conferred with appellees and made arrangements with them, or, had he conferred with our clerk and learned our customary procedure for ordering temporary copies to appellees so that they would not be cramped, we might be more receptive to his present assertion of concern.

Counsel had been fully warned by appellees' prior motion to dismiss that in their view time was of great importance in this case. Our own action had indicated that we agreed. The order of the District Court approving the Plan of Reorganization was entered on November 21, 1966. Appellant's subsequent motion was denied on December 7, 1966. We do not think that the fact that appellant chooses to employ counsel "without an office staff," or, apparently, other associates to whom he entrusts any work, should entitle him to set his own time schedule, break his own express commitments as to printing, and limit his consideration of our rules and procedure to making inquiry, it would seem, of his printer, and expect us to reverse our stand that in a case of this importance appellees, too, were entitled to consideration. We decline to reverse our action on the motion to extend time, and we allow appellees' second motion.

Order. The appeal is dismissed for want of diligent prosecution.

By the Court:

ROGER A. STINCHFIELD
Clerk.

Enter:
ALDRICH, CH. J.

APPENDIX B

"MANDATE"

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

APPELLANT,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,

APPELLEES

[IN THE MATTER OF BOSTON AND PROVIDENCE RAILROAD CORPORATION OF BOSTON.]

MEMORANDUM AND ORDER.

April 18, 1967.

Per Curiam. In connection with petitioner's request for rehearing reference is first made to our memorandum and order of March 29, 1967, much of the contents of which remains pertinent to, and is incorporated in, this memorandum. The relevant portions of petitioner's request may be summarized as follows:

1. Petitioner charges the court with not considering the merits. This, of course, is true. The reason the case was dismissed was because petitioner had not exercised reasonable diligence in presenting the merits.

2. Petitioner says that it is unfair to penalize it for the dereliction of its counsel. Our answer to this is that if someone must suffer because of dereliction of counsel it is more appropriate that it be his own client than the other side. This seems particularly so when it appears that the other side was vigorously objecting to postponement* and counsel for petitioner was using the delay, and perhaps capitalizing on it, to seek a settlement.

3. With respect to petitioner's asserted realization that he could not expect an extension which would postpone the time for argument, we must repeat that this was the necessary effect of what he did ask. Amplifying what we said before, had he made specific inquiry of the clerk's office he would have been told that an appellee's brief is due under the rules the Friday, plus a week, before the opening of the sitting. This is to permit time for a reply brief, so that request for permission to file such after the argument will be avoided. Hence the extension which petitioner requested would not have allowed the "one month" that it continues to talk about, but the rule's absolute minimum of three weeks. We have read the tendered galley of the brief which petitioner now wishes to file. It is incomprehesible that petitioner could have thought it fair, or even possible, that some 60 pages of assertion of broad and extensive mistakes of conduct, discretion, and law, could have been answered in three weeks.† Furthermore, we note that petitioner makes no reply to the statement in our previous memorandum that petitioner's printer informed us it could not possibly meet even the new date to which extension was sought.

*It should not be forgotten that appellees had moved to dismiss once before, and we had supported petitioner. (March 2, 1967).

†Petitioner's proposed brief complains of a large number of alleged improprieties commencing in 1936 and continuing almost uninterruptedly for thirty years. What date is selected for the commencement of its legal complaints is not clear.

In a reorganization proceeding, where pressing and important matters are involved, as appellees had fully brought to petitioner's attention, for an order of confirmation entered in November not to be reached until June is extraordinarily undesirable. For the reasons presently and hitherto given, we will not allow it.

Order. The petition is denied.

By the Court:

ROGER A. STINCHFIELD
Clerk.

Enter:

ALDRICH, CH. J.

Certified as a true copy and issued in lieu of formal mandate under Rule 33. Apr. 25, 1967.

ROGER A. STINCHFIELD
Clerk.